

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company and Columbus)	Case No. 10-2376-EL-UNC
Southern Power Company for Authority)	
to Merge and Related Approvals.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	
Ohio Power Company for Authority to)	Case No. 11-346-EL-SSO
Establish a Standard Service Offer)	Case No. 11-348-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code,)	
in the Form of an Electric Security Plan.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

In the Matter of the Application of)	
Columbus Southern Power Company to)	Case No. 10-343-EL-ATA
Amend its Emergency Curtailment)	
Service Riders.)	

In the Matter of the Application of)	
Ohio Power Company to Amend its)	Case No. 10-344-EL-ATA
Emergency Curtailment Service Riders.)	

In the Matter of the Commission Review)	
Of the Capacity Charges of Ohio Power)	Case No. 10-2929-EL-UNC
Company and Columbus Southern)	
Power Company.)	

In the Matter of the Application of)	
Columbus Southern Power Company)	Case No. 11-4920-EL-RDR
for Approval of a Mechanism to Recover)	
Deferred Fuel Costs Ordered Under)	
Ohio Revised Code 4928.144)	

In the Matter of the Application of)	
Ohio Power Company for Approval of a)	
Mechanism to Recover Deferred Fuel)	Case No. 11-4921-EL-RDR
Costs Ordered Under Ohio Revised)	
Code 4928.144)	

REPLY BRIEF
CONSTELLATION NEWENERGY, INC. AND
CONSTELLATION ENERGY COMMODITIES GROUP, INC.

November 18, 2011

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I. INTRODUCTION

Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (jointly “Constellation”) submit this reply brief in order to respond to a number of specific issues raised by the Opponents to the Stipulation. The Opponents include the Industrial Energy Users-Ohio (“IEU”), FirstEnergy Solutions, Inc. (“FES”), and the self-named “Consumer Parties”¹ consisting of the Appalachian Peace and Justice Network (“APJN”) and the Office of the Consumers’ Counsel (“OCC”). As described in greater detail below, the Stipulation will move AEP Ohio from providing energy and capacity based on its legacy generation assets using the hybrid pricing mechanism of Section 4928.143, Revised Code in favor of a competitive bid plan (“CBP”) and removal of numerous barriers which now confront retail customers who want to shop and Competitive Retail Electric Service (“CRES”) providers who want to supply.

The Stipulation is more than just a general outline of how to accomplish the major structural changes that will occur for AEP Ohio as they move from a quasi cost of service model as a vertically-integrated utility to one that will be reliant upon a competitive wholesale and retail market structure underneath an ESP. The Stipulation addresses a variety of issues regarding a CBP, including a master supply agreement, a commitment by AEP Ohio to participate in PJM’s Base Residual Auction, and to institute RPM pricing starting next year for a fifth of shopping customers, which escalates to 100% by June 2015.² Finally, the Stipulation provides CRES providers with needed information and data and removes certain notice and timing barriers to retail shopping.

A review of the record in the matter at bar shows the Opponents do not oppose or disagree with the broad sweep of change which the Stipulation provides. In particular, FES asserts that

¹ OCC and APJN Initial Brief, p. 1.

² Stipulation, ¶¶ IV(1)(r),(s),(q); IV(2)(b).

AEP Ohio's corporate separation and transition to a full competitive market is long overdue, and should be ordered immediately.³ IEU asserts that AEP Ohio is attempting to "erect a monopoly toll booth in interstate commerce" and that AEP Ohio is "attacking" their previously supported position in favor of a "market-based approach and competition as the best means to advance Ohio's policies and secure useful outcomes for customers."⁴ It is clear from these positions, that the Opponents agree that both wholesale and retail competition are a benefit to consumers and the public interest. Thus, the major issue in this proceeding is not if we should move to wholesale auctions to provide standard service energy and capacity, or having AEP Ohio separate its generation assets from the utility and participate in the PJM base residual auction with capacity costs being set by the PJM auction. Rather, the only major issue is what is the preferred method of achieving that goal or what is the timeframe for this transition.

To that end, by laying out a time table to the conversion of AEP Ohio from a vertically-integrated monopoly into a company that relies upon a competitive market (see Appendix B of the Stipulation) and the phase in of RPM pricing for all shopping customers (see Appendix C of the Stipulation) as well as outlining the future CBP, the Stipulation is a comprehensive plan of implementation as well as a document that sets goals. Further, the implementation plan has a broad base of support including the utility, the Staff, industrial trade associations, municipalities, colleges and universities as well as suppliers like Constellation, Exelon, and the Retail Energy Supply Association. The Commission has long had a policy of encouraging stipulations that have a broad base of support.⁵ The Stipulation, as a compromise

³ FES Initial Brief, pp. 124-27, 91-93.

⁴ IEU Initial Brief, pp. 1, 4.

⁵ *In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC (November 26, 1985), p. 7 ("The Commission agrees with Dr. Hall that it is sound regulatory policy to encourage parties to its proceedings to resolve issues through negotiated settlements.").

among the parties, a plan of action as well as statement of position, offers certainty and stability. That is in sharp contrast to the uncertainty and inconsistencies that would occur if all ten consolidated cases in this matter are settled by future litigation, which is the outcome if the Stipulation is rejected.

Finally, despite the claims of the Opponents, the Stipulation, as demonstrated in Constellation's initial brief and in the briefs of other Signatory Parties, is the result of serious bargaining between knowledgeable and capable parties. The Stipulation benefits ratepayers and the public interest. The Stipulation does not violate any significant regulatory principles or practices. Constellation urges the Commission to approve the Stipulation, which sets forth a defined 41 month plan to competitive procurement of standard service capacity and energy, RPM pricing for all, increased access to data for CRES providers, and a greater ability for retail customers to have meaningful opportunities to shop for competitive supply.

II. Contrary to Assertions of the Opponents, the Stipulation Was the Result of Serious Bargaining Among Knowledgeable and Capable Parties.

The Opponents argue for a number of reasons that the Stipulation is not the result of serious bargaining among capable and knowledgeable parties as is required by the Commission in order to approve a Stipulation. Constellation finds the above assertions by FES, IEU, OCC and APJN to be meritless for the following reasons. First, FES asserts that the fact that the Signatory Parties did not have updated shopping data from AEP Ohio to appreciate the impact of the two tier capacity prices means the stipulation was not the result of serious bargaining among knowledgeable and capable parties.⁶ FES further asserts that AEP Ohio knew that the commercial class was already oversubscribed, and that AEP Ohio knew that fact and withheld that

⁶ FES initial brief, pp. 147-48.

information from other parties.⁷ There is no factual basis for either of these allegations. First, shopping data is compiled by the Commission Staff and published on the Commission's website.⁸ No facts were presented by the Opponents that a gap in the known information existed that negated the information that the negotiating parties had.

As for the Opponents' claim that AEP Ohio knew that the commercial allowance of RPM pricing was filled by September 7, 2011 and intentionally withheld that information, AEP Ohio witness Mr. Allen testified under oath that AEP Ohio was not aware that the commercial set-aside had been filled.⁹ Even if FES's assertion was correct, the structure of the Stipulation provides for additional RPM-priced capacity set asides in 2013, 2014 and reaches 100% in 2015.¹⁰

III. The Stipulation Does Not Violate Any Regulatory Principles or Practices.

The opponents assert that the Stipulation violates certain regulatory principles or practices. Constellation again finds each of these arguments meritless. However, Constellation will focus in particular on the assertions made by FES that the Stipulation is anti-competitive.¹¹

FES argues that the two-tiered capacity pricing acts as a "cap" on shopping.¹² FES asserts that CRES providers will not be able to provide customers with "meaningful opportunities to save money relative to the SSO price" if capacity is priced at \$255-MW/day.¹³ However, contrary positions were taken by other representatives of CRES providers who indicated that while the two-tiered capacity prices would tend to limit shopping, this would not preclude shopping above

⁷ Id.

⁸ See

<http://www.puco.ohio.gov/puco/index.cfm/industry-information/technical-reports/the-ohio-retail-electric-choice-programs-report->

⁹ Tr. Vol. XII, pp. 2069-2070.

¹⁰ Stipulation, ¶IV(2)(b)(3).

¹¹ FES Initial Brief, pp. 85-116.

¹² Id. at pp. 94-103.

¹³ Id. at 95.

the percentages or act as a “hard cap.”¹⁴ As noted by Constellation witness David Fein, a customer’s decision to shop is not based solely on price, and “[t]here are other considerations that customers take into account when making a decision to shop....”¹⁵ For example, a customer could choose varying lengths in contracts and/or other service options that a utility cannot provide.

FES also argues that the Appendix C queue process will further inhibit competition.¹⁶ In particular, FES notes that Appendix C has “anti-competitive roots” as it is based on rules established in Michigan that implement a law which sets hard caps on shopping.¹⁷ FES also argues that Appendix C is arbitrary and confusing and thus will limit shopping.¹⁸

FES’s comparison of Appendix C to Michigan’s hard shopping caps really misses the point and is somewhat misleading. First, no party contests the fact that Appendix C was largely based upon a queue process that was designed to address a hard cap on retail shopping established in Michigan’s flawed energy law. Second, Appendix C is not identical to the queue process adopted in Michigan. Despite the fact that the *rules* that enforce Michigan’s shopping caps and the two-tier capacity prices set out in the Stipulation are similar, this does not mean that the two-tiered capacity charges are equivalent to the hard caps on shopping permitted under Michigan. In fact, as noted above, the two tier capacity charges are *not* hard caps on shopping, and by 2015, 100% of capacity will be set at RPM pricing.¹⁹ No such escalation exists in Michigan.²⁰

The existence of two tiers of capacity pricing for 41 months before becoming only RPM pricing is a reasonable compromise for the significant structural changes that will be instituted by AEP Ohio. Most importantly, using the first come, first served method of allocating RPM-priced

¹⁴ RESA Ex. 1, pp. 7-9; Constellation Ex. 1, pp. 7-9.

¹⁵ Tr. Vol. VI, p. 974.

¹⁶ FES Initial Brief, pp. 103-11.

¹⁷ Id. at 104.

¹⁸ Id.

¹⁹ Stipulation, ¶IV(2)(b)(3).

²⁰ Cross-examination of Constellation witness Mr. Fein, Tr. Vol. VI, p. 986.

capacity during the conversion to 100% RPM pricing as called for in Appendix C allows all customers that were shopping prior to ESP II to receive the same pricing that was available at the time they signed their contracts.²¹ New shopping customers will know the pricing scheme in advance and gradually increasing availability of RPM priced capacity will be conducted on a first come, first served basis.²²

Finally, the detailed implementation plan that implements Appendix C was the subject of extensive negotiations, and as a result of these negotiations, the detailed implementation plan takes into account numerous possibilities and outcomes.

IV. Contrary to the assertions of the Opponents, the Stipulation does not signal a retreat from the Competitive Market, but instead Sets Forth a Reasonable Glide Path to Facilitate that Transition.

FES argues that AEP Ohio's transition to market is not a benefit of the ESP because "...there are several conditions on that transition."²³ IEU asserts a similar weakness.²⁴ This attack on the Stipulation is unfounded. The Stipulation is, to the extent possible, a fully integrated agreement that recognizes the importance of AEP Ohio's transition to a "100% competitive, market-based pricing regime that will rely upon a competitive wholesale procurement process and AEP Ohio moving its generation into the PJM RPM capacity auction."²⁵

A. *The Stipulation Lays Out A Clear and Heavily Negotiated Plan For AEP Ohio's Transition to Competitive Market.*

An integral part of AEP Ohio's transition to a competitive bid process is AEP Ohio's commitment to transform its business structure through divestiture of its generation assets. In order to complete this business restructuring, AEP Ohio must complete full legal corporate

²¹ RESA Ex. 1, pp. 7-9.

²² Stipulation, ¶IV(2)(b)(3); Constellation Ex. 1, p. 8.

²³ FES Initial Brief, p. 79.

²⁴ IEU Initial Brief, pp. 28-29.

²⁵ Constellation Ex. 1, p. 9.

separation and modification or termination of its pool agreement.²⁶ These steps require AEP Ohio to receive approval by the Commission as well as the FERC.²⁷

As the Commission is well aware, AEP Ohio is currently an integrated company that provides generation, distribution and transmission functions. Thus, in order to transition to the competitive market model, AEP Ohio must complete full legal corporate separation as required by Section 4928.17, Revised Code. Under the Stipulation, AEP Ohio has committed to full legal corporate separation so that its transmission and distribution assets will be held by the electric distribution utility, but its generation assets²⁸ will be transferred to a new affiliate, AEP GenCo.²⁹

The Stipulation requires the Commission to approve AEP Ohio's full legal corporate separation as part of this proceeding.³⁰ The Commission will maintain oversight of the process through the 11-5333-EL-UNC case docket, in which AEP Ohio has already filed an application for corporate separation. Once the Commission approves AEP Ohio's full legal corporate separation, AEP Ohio will give notice to PJM that it plans to participate in the Base Residual Auction ("BRA") for delivery years 2015–2016.³¹ However, the fine points and details of the corporate separation need not be finalized prior to this notice, and AEP Ohio witness Mr. Nelson notes that corporate separation need not be *completed* prior to AEP Ohio's commitment to provide notice to PJM in March 2012.³²

As a result of AEP Ohio's corporate separation and divestiture of its generation assets, AEP Ohio must also modify or terminate the AEP Interconnection Agreement (also known as the

²⁶ AEP Ohio Ex. 7, p. 23.

²⁷ See Appendix B to the Stipulation.

²⁸ With the exception of GRR assets. Stipulation, ¶IV(1)(q).

²⁹ Stip. IV(1)(q); Tr. Vol. V, p. 697.

³⁰ Stip. IV(1)(q).

³¹ Id. See also Tr. Vol. V, pp. 686-87.

³² Tr. Vol. V, p. 688.

“pool agreement”).³³ The pool agreement is a FERC-approved wholesale power pooling agreement in place to allow AEP East operation companies to collectively participate to supply capacity.³⁴ AEP Ohio’s move to divest its generation assets necessarily requires modification or termination of this pool agreement, as well as several other pool agreements.³⁵ Although the termination or modification of the pool agreement may be a complicated process, AEP Ohio witness Mr. Nelson notes that the process should be “driven to conclusion in a reasonable period of time and without much doubt as to the end goal of taking AEP Ohio out of the Pool.”³⁶

As noted in Appendix B of the Stipulation, completion of corporate separation and pool termination or modification will require AEP Ohio to file Section 205 and Section 203 filings with the FERC. The filings at the FERC involve several procedural steps, including potential interventions and protests. Appendix B estimates that a FERC order will be issued by February 1, 2013. Further, the Stipulation requires AEP Ohio to work with Staff to achieve the FERC approvals and to conduct quarterly meetings with the Signatory Parties to address the progress of the approvals.³⁷

Once corporate separation and the pool termination or modification is approved by FERC and the Commission, AEP Ohio will begin its CBP for delivery years 2015–2016.³⁸ On or before September 1, 2013, AEP Ohio will conduct a CBP for the first 20 tranches; on or before September 1, 2014, AEP Ohio will conduct a CBP for the next 40 tranches, and the remainder of the load will

³³ AEP Ex. 7, p. 20.

³⁴ AEP Ex. 7, p. 15-16.

³⁵ Id. at 17, 23. As noted by AEP Ohio witness Nelson, “...these provisions recognize that AEP Ohio must achieve corporate separation and Pool termination/modification in order to transition from its current regulatory and business structure to one that involves an auction-based SSO.” Id. at p. 23.

³⁶ Id. at 20.

³⁷ Stipulation, ¶IV(1)(t).

³⁸ Note that even if for some reason this is not approved, AEP Ohio is still required to move forward, as discussed below.

be auctioned on or before January 1, 2015.³⁹ As discussed in Constellation's initial brief and in the testimony of AEP Ohio witness Dr. LaCasse, this CBP is highly negotiated and is extensively considered in the Stipulation and allows for future stakeholder participation.

B. The Stipulation Contains Limited Contingencies Related to the Required FERC Approvals.

While the Stipulation provides a significant level of detail regarding the transition process, the Stipulation also recognizes that AEP Ohio's transition to market is dependent to some extent on the approval of the FERC and PUCO. The Stipulation recognizes these limitations and thus provides for two limited contingencies to reaching full competitive market—FERC approval of the pool termination and Commission approval of the corporate separation.

Although the Opponents state that AEP Ohio is able to “avoid” their obligations to move to a fully competitive wholesale and retail market model under this Stipulation, in reality, these contingencies are very limited.⁴⁰ AEP Ohio is only permitted to fully withdraw from its Commitment to move to a full CBP by June 1, 2015, if the FERC completely denies AEP Ohio's applications for corporate separation and pool termination/modification.⁴¹ The mere imposition of conditions is not considered a denial.⁴² If the FERC were to completely deny these applications, the Signatory Parties have recommended that the Commission commence a proceeding and alter the stipulation as necessary, including increasing the RPM-price capacity set-asides.⁴³

If the FERC proceedings approving corporate separation and pool termination are still pending at the time of the first scheduled auction by September 1, 2013, the auction for the first 20

³⁹ Stipulation, ¶IV(1)(r).

⁴⁰ FES Initial Brief, p. 126.

⁴¹ Stipulation, ¶IV(1)(t).

⁴² Id.

⁴³ Id.

tranches will be pushed back until December 1, 2013, in order to allow for additional time for an order to be issued.⁴⁴ Further, if the FERC proceedings are still pending at the time of the second auction for the next 20 tranches on September 1, 2014, the Commission will delay the auction by two months, but nevertheless go forward with the auction on December 1, 2014.⁴⁵ If the FERC proceedings have not been completed by January 1, 2015, the final auction for 60 tranches will be delayed until April 1, 2015 to allow for the FERC proceedings to finalize.⁴⁶ Although Mr. Nelson stated that if the FERC proceedings are not concluded by June 2015, AEP Ohio would not be required to auction the remaining 60 tranches, Mr. Nelson also stated that this circumstance is unlikely and he “fully expect[s] that the FERC would have ruled on this proceeding by that time.”⁴⁷

The Opponents also incorrectly assert that the Stipulation provides for no repercussions if AEP Ohio’s fails to comply with its obligations. As noted above, the Stipulation provides for the signatory parties to conduct a compliance investigation and consider appropriate modifications to the Stipulation if the FERC denies AEP Ohio’s corporate separation and pool modification filings. If the progress of the proceedings are unduly delayed, and the Signatory Parties believe AEP Ohio has not pursued fulfillment of the milestones in Appendix B or has otherwise failed to address matters within its control, the parties may raise the matter at the PUCO or file a Motion to Enforce the Stipulation.⁴⁸ The Stipulation also recommends that the Commission automatically open an inquiry docket to review AEP Ohio’s diligence in pursuing these goals.⁴⁹ The Stipulation also provides for continued auctions, despite AEP Ohio’s inability to achieve timely corporate separation or Pool modification/termination.⁵⁰

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.; Tr. Vol. V, pp. 727-730.

⁴⁷ Tr. Vol. V, p. 728.

⁴⁸ Stipulation, ¶IV(1)(t).

⁴⁹ Id.

⁵⁰ Id.; Exelon Ex. 1, p. , 7.

As noted by Exelon witness Mr. Dominguez, AEP Ohio found the corporate separation and pool termination/modification to be "...important preconditions to ensuring competitive procurement would be economically feasible for the Company."⁵¹ The Signatory parties recognized these concerns and thus reached a compromise allowing for limited contingencies in the Stipulation that "strikes a fair balance between protecting... AEP Ohio's legitimate economic interests (that may arise from termination or modification of the existing Pool agreement) and the ultimate goal of transitioning to a competitive market process for establishing the SSO price."⁵²

This Stipulation represents a transition to the competitive market as soon as practicable and recites the number of commitments and steps that must be taken in order to get there. AEP Ohio has unique circumstances in that it must conduct corporate separation and pool modification prior to achieving a full transition to the competitive wholesale and retail market. AEP Ohio cannot control the outcome of these governmental agencies, it can only make the appropriate filings which thus far have been fulfilled.⁵³ The Opponents insinuate that AEP Ohio can control whether they get the necessary approvals and can manipulate the outcome, but they have provided no evidence that such is the case. In fact, in the case of corporate separation approval, it is not AEP Ohio but the objections and request for a hearing by the Opponents which have put approval at risk.

In sum, given the filings that have been made, it is fair to say that AEP Ohio is committed to making this transition and has taken the necessary steps to obtain corporate separation through its application in Case No. 11-5333-EL-UNC as well as the initial steps to obtain pool termination

⁵¹ Exelon Ex. 1, p. 6.

⁵² Id. at p. 7.

⁵³ See Ohio Power Company's Application for Approval of an Amendment to its Corporate Separation Plan filed September 30, 2011 in Case No. 11-5333-EL-UNC and AEP Ohio Ex. 7, p. 19 ("On December 17, 2010, AEP Ohio and other parties to the Pool provided written notice to each other of their mutual desire to terminate the existing agreement on three years notice in accordance with Article 13.2.").

by giving written notice to the other parties of its desire to terminate the existing agreement.⁵⁴ The details and limited contingencies of the Stipulation reflect the amount of time and effort the signatory parties committed to during the negotiations that resulted in the Stipulation. As a result, the Signatory Parties understood AEP Ohio's process to transition to market, and the Stipulation produces a balanced approach to the transition.

V. Conclusion

For the reasons presented in its Initial Trial Brief as supplemented by the arguments presented in this Reply Brief, Constellation requests the Commission approve the Stipulation as filed.

Respectfully submitted,



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⁵⁴ Id.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 18th day of November, 2010 by regular U.S. mail, postage prepaid, or by electronic mail, upon the persons listed below.



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Summary: Reply Reply Brief electronically filed by M HOWARD PETRICOFF on behalf of Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.